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IN THE

Supreme Court of the United States

FILED

October Term, 1974

No. 74-803

MIKE YATZOR, *Petitioner*

v.

HERBERT ALLEN, GLENN SHIELDS, RAY SHOWMAN, *all individually and as Supervisors of* WASHINGTON TOWNSHIP, ERIE COUNTY PENNSYLVANIA, RAY SANDERS, JOSEPH HECKER, and ROBERT TRACY, *individually and as Supervisors of* WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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MIKE YATZOR, *Petitioner*

v.

HERBERT ALLEN, *et al.*, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION

On April 7, 1962, Petitioner, Mike Yatzor, was employed by the Supervisors of Washington Township, Erie County, Pennsylvania as a Township policeman. At the first meeting of each calendar year commencing in January, 1963, Yatzor's employment was continued for each such calendar year by the Township Supervisors, until the year 1967. At a meeting held on January 7, 1967, Yatzor's employment was discussed by the Supervisors. His employment was not renewed, and Yatzor was so informed. On March 21, 1967, Yatzor's retained counsel, Joseph Walsh, notified the Supervisors that he was aware that Yatzor had been relieved of his duties by the Supervisors on January 7, 1967, and that he intended to take legal action if the matter was not resolved. On August 3, 1967, Yatzor filed

a "Petition for Appeal" in the Court of Common Pleas of Erie County, Pennsylvania, stating that the Supervisors refused to answer his inquiry, refused to give him a statement in writing as to the charges against him, and refused him a hearing. From August 3, 1967 until July 7, 1972, Yatzor unsuccessfully pursued his state court remedies. On July 7, 1972, the Supreme Court of Pennsylvania refused Yatzor's petition for allocatur from the Superior Court of Pennsylvania, thus terminating the state court proceedings. Yatzor did not appeal that decision to this Court.

On July 3, 1973, Yatzor filed his complaint in the United States District Court for the Western District of Pennsylvania under the Civil Rights Act, 42 U.S.C. §§1983, 1985, 1986 and 28 U.S.C. 1343. Petitioner asserted alleged violations of due process and equal protection under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. The Township Supervisors filed a motion to dismiss the action on the grounds that it was barred by the six year Pennsylvania statute of limitations which commenced on January 7, 1967, when Yatzor's employment was terminated. The District Court entered an order and opinion on November 8, 1973, granting the Supervisors' motion to dismiss which was treated as a motion for summary judgment.

After the District Court dismissed the plaintiff's complaint and action with prejudice on November 8, 1973, for reasons which appear more fully in the decision of the District Court (Petitioner's Appendix C), Petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court. Petitioner then filed for a petition for rehearing, which was denied by the Court of Appeals on September 26, 1974.

REASONS FOR DENYING WRIT

A. There is no conflict among the circuit courts of appeal concerning the decisions and order rendered in this matter by the Court of Appeals of the Third Circuit.

In affirming the order of District Judge Weber, the Third Circuit Court of Appeals concurrs with the District Court's finding that the applicable Pennsylvania statute of limitations serves to bar the Petitioner's cause of action (Appendix A, page 1A).

Petitioner concludes that August 3, 1967, the date Petitioner filed a petition for appeal in the Erie County Court of Common Pleas, is the pertinent date for purposes of computing the six (6) year statute of limitations. (Petition for Writ of Certiorari, Page 15). This conclusion was not adopted by either the District Court or the Court of Appeals.

> ". . . Plaintiff's cause of action accrued at the time when a particular act was done which caused him damage; *Auld v. Mobay Chemical Company*. This Act has been established by the evidentiary materials to have occurred on January 7, 1967, and the Plaintiff recognized this was so in his pleadings filed in the State Court action." (Opinion of the District Court, Appendix C, Page 6A).

In *Auld v. Mobay Chemical Company*, 300 F. Supp. 138 (W.D. Pa. 1969), the Court stated that the applicable statute of limitations to be applied in an action for conspiracy to deprive plaintiff of his civil rights is the state statute of limitations applicable to the substantive offense. The opinion concluded that a conspiracy was actionable when it produced an overt act which injured the complaining party and that the applicable statute of limitations runs from the commission of such an overt act.

The applicable Pennsylvania statute of limitations for the substantive offense of breach of contract (in this case

an employment contract) is six (6) years. 12 Pa. Stat. Ann. §31. Here, the overt act from which the statute of limitations began to run was the dismissal of Petitioner on January 7, 1967. To assert, as does Petitioner, that the statute of limitations did not begin to run until the date he filed suit in state court is untenable.

The cases cited by Petitioner dealing with concealment or fraud giving rise to an estoppel preventing a respondent from asserting the defense of the statute of limitations are not applicable. Yatzor was aware on January 7, 1967, that he had been dismissed. Subsequent settlement conferences between counsel for the parties do not establish fraud or estoppel sufficient to toll the statute of limitations. *Aetna Life Insurance Company v. Mayer*, 113 F.2d 974; *Iacapone v. New Amsterdam Casualty Company*, 258 F. Supp. 880, 883, 884 (W.D. Pa. 1966), *affd.* 379 F.2d 311 (3rd Cir. 1967), *cert. den.* 389 U.S. 1054, 88 S. Ct. 802, 19 L. Ed.2d 849 (1968).

The only genuine issue as to a material fact which existed with regard to the applicability of the defense of the statute of limitations was a determination of the last date on which an overt act injuring Petitioner had been committed by Respondent. The evidentiary materials established without doubt that the date of such overt act took place more than six (6) years prior to the filing of suit in the District Court.

Other circuit courts have held the state statute of limitations is applicable to determine whether the Federal action is barred. *Knowles v. Carson*, 419 F.2d 369 (5th Cir. 1969); *Crawford v. Zeitler*, 326 F.2d 119 (6th Cir. 1964). The decision of the Third Circuit Court of Appeals in affirming the order of the District Court, is clearly in accord with these decisions.

B. There is no conflict with applicable state law and state decisions with regard to the decision and order rendered in this matter by the Third Circuit.

The District Court held:

> "There is no dispute between the parties that the Pennsylvania six (6) year Statute of Limitations for actions in assumpsit (12 P.S. §31) would govern this cause of action because Plaintiff's claim is basically a claim for unlawful termination of his contract of employment." (Opinion of the District Court, Appendix C, Page 3A).

It does not appear from the petition for writ of certiorari that Petitioner contends that the six (6) year Pennsylvania statute is not the applicable statute of limitations. Neither does it appear that there is a genuine issue of material fact as to the occurrence of the overt act which created Petitioner's cause of action. Petitioner's discharge on January 7, 1967, was the overt act. *Helmig v. Rockwell*, 389 Pa. 21, 131 A. 2d 622 (1957), *cert. den.* 355 U.S. 832, 78 S.Ct. 46, 2 L.Ed.2d 44, *reh. den.*, 355 U.S. 885, 78 S.Ct. 146, 2 L. Ed.2d 115.

The order of the Third Circuit Court of Appeals affirming the order of the District Court is not in conflict with applicable Pennsylvania state law and state decisions. The cause of action accrued on January 7, 1967. Petitioner had until January 7, 1973, to institute suit. (12 Pa. Stat. Ann. §31). Petitioner did not file the present suit until July 3, 1973. The decision and order rendered by the Third Circuit Court of Appeals is in accordance with applicable Pennsylvania law. 12 Pa. Stat. Ann. §31; *Owen v. Western Saving Fund*, 97 Pa. 47 (1881); *Binney's Appeal*, 116 Pa. 169, 9 A.186 (1887); *Mark v. Osmer*, 138 Pa. 1, 20 A. 841 (1890).

C. The Third Circuit Court of Appeals did not decide a question of federal law.

United States Supreme Court Rule 19 (28 U.S.C.A.) sets forth various considerations governing review on certiorari. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Where a court of appeals has decided an important question of federal law, which has not been, but should be settled by the Court, the Court has sometimes reviewed the matter. U.S. Supreme Court Rule 19(b) (28 U.S.C.A.); *Yellin v. United States*, 374 U.S. 109, 83 S.Ct. 1828, 10 L. Ed.2d 778 (1963); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56, *reh. den.*, 366 U.S. 941, 81 S.Ct. 1657, 6 L.Ed.2d 852 (1961).

Petitioner admits on Page 12 of the petition that this case involves a state statute only. In effect, Petitioner has attempted to induce this Court to consider a question of state law. The most thoughtful legal analogy should not enable Petitioner to create an issue concerning a Federal question where, in fact, the Circuit Court made no decision regarding Federal Law.

D. The decision of the Third Circuit Court of Appeals in this matter is not in conflict with applicable decisions of this Court.

The District Court ordered that Petitioner's action be dismissed because it was barred by the Statute of Limitations. The Third Circuit Court of Appeals affirmed the District Court's order. Noteworthy only by their absence are any citations by Petitioner to decisions rendered by this Court, or any other court, which would be in conflict with the Decision of the District Court and the Third Circuit in this matter.

In contrast, this Court has denied petitions for writ of certiorari where the applicable state statute of limitations barred an action under the Federal Civil Rights Act. *Henig v. Odorioso*, 385 F.2d 491 (3rd Cir. 1967), *cert. den.* 390 U.S. 1016, 88 S.Ct. 1269, 20 L. Ed.2d 166, *reh. den.* 391 U.S. 929, 88 S.Ct. 1814, 20 L. Ed. 2d 671 (1968); *Gaito v. Strauss*, 368 F.2d 789 (3rd Cir. 1966); *cert. den.* 386 U.S. 977, 87 S.Ct. 1173, 18 L.Ed. 2d 139 (1967). In denying the petition for writ of certiorari, in *Henig v. Odorioso, supra*, this Court relied upon the opinion of the Third Circuit Court of Appeals:

> "Since the Civil Rights Act contains no provisions limiting the time within which an action thereunder may be brought, the applicable Statute of Limitations is that which the State would enforce had the action seeking similar relief been brought in State Court." *Id* at 493.

Petitioner is not entitled to have this Court review alleged violations of constitutional rights when in fact there exists no conflict between decisions of this Court and the decision rendered by the Third Circuit Court of Appeals.

E. Petitioner failed to raise any issue as to the unconstitutionality of the Pennsylvania Police Tenure Act in any of the proceedings in the courts of Pennsylvania and failed to exhaust all of his available state remedies.

Nowhere in the proceedings in the Pennsylvania state courts did Petitioner raise any issue concerning the unconstitutionality of the Pennsylvania Police Tenure Act, 53 Pa. Stat. Ann. §811 et. seq. In *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L. Ed. 2d 572, *on remand*, 302, N.Y.S. 2d 848, 24 N.Y.2d 1026, 259 N.E. 2d 250 (1969), this Court stated that in order to vindicate its jurisdiction to deal with the particular issue at hand, the court must inquire whether

that issue was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed the lower court. If the issue was not so presented to the state court, this Court has stated that it has no power to consider the issue. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court, unless the aggrieved party can affirmatively show the contrary. *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68, 90 L. Ed. 3 (1945); and *Chicago, I.L.R. Co. v. McQuire*, 196 U.S. 128, 131-33, 25 S.Ct. 200, 201. 49 L.Ed. 413 (1905). "Where a Federal claim can be raised at trial, it may be forfeited by failure to make a timely assertion of the claim." *Jennings v. State of Illinois*, 72 S.Ct. 123 at 126, 342 U.S. 104, 96 L. Ed. 119.

Petitioner failed to raise any issue attacking the constitutionality of the Pennsylvania state statute in the state courts of Pennsylvania. Petitioner is not now entitled to review on that constitutional issue.

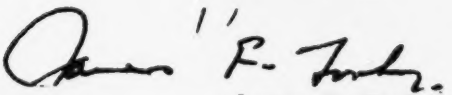
Petitioner did not appeal to this Court from the final decision of the Supreme Court of Pennsylvania denying him relief. Thus, Petitioner is not entitled to a review of the constitutionality of Pennsylvania Policy Tenure Act in the federal courts.

CONCLUSION

For the reasons as set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

By:
John G. Gent

By: 
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